Supreme Court, U.S.
FILED

09-719 SEP 30 2009

No. ——OFFICE OF THE CLERK

In The
Supreme Court of the United States

DANIEL KONAR - *Petitioner,*

v.

STATE OF ILLINOIS - *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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December 1, 2009

APPENDIX

United States Court of Appeals for the
Seventh Circuit Order Denied Rehearing,
July 2, 2009..... App. 2

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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Before

Hon. ILANA DIAMOND ROVNER, Circuit Judge
Hon. DIANE P. WOOD, Circuit Judge
Hon. DIANE S. SYKES, Circuit Judge

No. 08-3208

DANIEL S. KONAR
Plaintiff-Appellant,
v.
STATE OF ILLINOIS
Respondent-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 07 C 628
John W. Darrah, Judge

ORDER

(Filed July 2, 2009)

On consideration of the petition for rehearing, all of the judges have voted to deny rehearing. It is therefore ordered that the petition for rehearing is DENIED.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Before

Hon. ILANA DIAMOND ROVNER, Circuit Judge
Hon. DIANE P. WOOD, Circuit Judge
Hon. DIANE S. SYKES, Circuit Judge

No. 08-3208

DANIEL S. KONAR
Petitioner-Appellant,
v.
STATE OF ILLINOIS
Respondent-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 07 C 628
John W. Darrah, Judge

FINAL JUDGMENT

(Filed May 14, 2009)

The judgment of the district court is modified to reflect a dismissal for failure to state a claim, and we AFFIRM as modified. The above is in accordance with the decision of this court entered on this date.

App. 4

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted May 11, 2009

Decided May 14, 2009

Before

Hon. ILANA DIAMOND ROVNER, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

Hon. DIANE S. SYKES, Circuit Judge

No. 08-3208

DANIEL S. KONAR
Petitioner-Appellant,
v.
STATE OF ILLINOIS
Respondent-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 07 C 628

John W. Darrah, Judge

ORDER

(Filed May 14, 2009)

Daniel Konar sued the State of Illinois in federal court after he became unhappy with the course of a divorce and custody matter. Konar claims that rulings issued in that statecourt litigation have violated his constitutional rights. The district court dismissed the complaint on the basis of sovereign

immunity. We affirm, but modify the judgment to reflect a dismissal for failure to state a claim. *See Richards v. Kiernan*, 461 F.3d 880, 886 (7th Cir. 2006).

The State of Illinois is the only defendant named in Konar's amended complaint. His lawsuit, filed shortly before judgment was entered in his divorce proceeding, accuses the State of depriving him of custody of his son without due process and engaging in gender discrimination. The State's conduct, according to Konar, violated his rights under the Constitution as well as Title IX of the Education Amendments of 1972, the Universal Declaration of Human Rights, and the Vienna Declaration and Programme of Action. As relief Konar asked that the district court exercise jurisdiction over his Illinois divorce case, declare the Illinois Marriage and Dissolution of Marriage Act unconstitutional, and award him $12 million in damages. The court had earlier dismissed Konar's first complaint on the ground that the State was immune from suit under the Eleventh Amendment, and at the State's urging, the court dismissed the amended complaint on the same basis, this time with prejudice. Our review is de novo. *See Vill. of DePue, Illinois v. Exxon Mobil Corp.*, 537 F.3d 775, 782 (7th Cir. 2008).

In the district court the State argued that the entire complaint could be dismissed with prejudice under the Eleventh Amendment, but in this court the State retreats from that position. As the State now concedes, Title IX abrogates its Eleventh Amendment immunity, *see* 42 U.S.C. § 2000d-7(a)(1);

Cherry v. Univ. of Wis. Sys. Bd. of Regents, 265 F.3d 541, 554-55 (7th Cir. 2001), and that immunity, although intact for Konar's remaining claims, *see Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985), would not have allowed dismissal *with prejudice* of nonfrivolous claims that might have been litigated in state court, *see Feldman v. Ho*, 171 F.3d 494, 498 (7th Cir. 1999). But dismissal with prejudice was still correct because Konar's complaint is frivolous. Except for the Title IX claim, the suit is premised on 42 U.S.C. § 1983, yet that statute does not authorize litigation against the states for violations of the Constitution or federal law, including treaty obligations. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Holton v. Ind. Horse Racing Comm'n*, 398 F.3d 928, 929 (7th Cir. 2005); *see also Jogi v. Voges*, 480 F.3d 822, 827-28 (7th Cir. 2007). Thus, a straightforward application of § 1983 resolves all but the Title IX claim, and the district court should have refrained from addressing the question of sovereign immunity. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 779-80 (2000); *Holton*, 398 F.3d at 929. Moreover, Konar cannot state a claim under the Universal Declaration of Human Rights or the Vienna Declaration because both are non-binding declarations that provide no private rights of action. *See* World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc A/ CONF.157/23 (July 12, 1993); Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); *Sosa v. Alvarez Machain*, 542 U.S.

692, 734 (2004) (explaining that Universal Declaration is simply a statement of principles and not a treaty or international agreement that would impose legal obligations); Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 EUR. J. INT'L L. 903, 918 (2008) (noting that Vienna Declaration is "non-binding"). And to the extent that Konar claims a violation of Title IX in connection with a court ordered parenting class, he does not allege that an educational institution excluded him from participation, denied him benefits, or subjected him to sex discrimination within the context of the program itself, as would be necessary to state a claim under Title IX. *See* 20 U.S.C. § 1681(a); *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640-41 (1999); *Hansen v. Bd. of Trs. of Hamilton Se. Sch. Corp.*, 551 F.3d 599, 604-05 (7th Cir. 2008); *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1018-19 (7th Cir. 1997).

Accordingly, the judgment of the district court is modified to reflect a dismissal for failure to state a claim, and we AFFIRM as modified.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DANIEL S. KONAR,
Petitioner,
v.
STATE OF ILLINOIS,
Respondent.

ORDER
No. 07 C 628
(Filed Aug 23, 2007)

DOCKET ENTRY TEXT

On May 31, 2007, this Court granted Defendant's Motion to Dismiss for Lack of Jurisdiction. Plaintiff was given leave to file an amended complaint, stating proper grounds for federal jurisdiction. The Court's order stated that the failure to do so would result in dismissal with prejudice. On June 21, 2007, Plaintiff filed an amended complaint, purporting to state the basis for federal jurisdiction. However, Plaintiff has not overcome the Eleventh Amendment's procedural bar as fully explained in the Court's order of May 31, 2007. Thus, for the reasons set forth in this Court's May 31, 2007, Plaintiff's Amended Complaint is dismissed with prejudice. Defendant's Motion to Dismiss the Amended Complaint [24] is granted. The status

hearing set for October 3. 2007, at 9:00 A.M. is vacated.

BY THE COURT:

/s/ John W. Darrah

District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DANIEL S. KONAR,
Petitioner,
v.
STATE OF ILLINOIS,
Respondent.

ORDER
No. 07 C 628
(Filed May 31, 2007)

DOCKET ENTRY TEXT:

For the reasons set forth below, Defendant's Motion to Dismiss for Lack of Jurisdiction [8, 9] is granted. Plaintiff is given leave to file an amended complaint, stating the grounds for federal jurisdiction, within twenty-one (21) days of this order. Failure to do so will result in dismissal with prejudice. Status hearing set for June 6, 2007 at 9:00 a.m. is vacated and reset to August 21, 2007 at 9:00 a.m.

STATEMENT

Plaintiff, Daniel Konar, proceeding pro se, filed a Complaint against the Defendant, the State of Illinois. The gravamen of the Plaintiff's Complaint is his assertion that the Defendant conspired to take the minor son from his custody without a trial, a hearing, or due process in violation of the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution and other unnamed, civil rights statutes. The Complaint also asserts that the State of Illinois allowed the libel and slander of the Plaintiff. Plaintiff seeks injunctive relief and compensatory and punitive damages. Currently before the Court is the Defendant's Motion to Dismiss for Lack of Jurisdiction on the basis of state sovereignty.

The federal courts are empowered to hear only those cases that (1) are within the judicial power of the United States, as defined in the Constitution, and (2) have been entrusted to them by a jurisdictional grant by Congress. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) ("The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded.") The presumption is that a federal court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists. *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 337 (1895). Thus, it is axiomatic that a federal court must assure itself that it possesses jurisdiction over the subject matter of an action before it can proceed to take any action

respecting the merits of the decision. *Cook v. Winfrey,* 141 F.3d 322, 325 (7th Cir. 1998).

Here, the Plaintiff has sued the State of Illinois. The Eleventh Amendment's sovereign immunity clause expressly precludes federal courts from exercising jurisdiction over any law or equity claims, unless a state consents to suit or unless Congress overrides the Eleventh Amendment by specifically legislating under constitutional grant of authority. *Tenn Student Assistance Corp. v. Hood*, 541 U.S. 440, 446 (2004); *Pennhurst St. Sch. V. Halderman*, 465 U.S. 89, 100-01 (1984) (*Pennhurst*). The sovereign immunity clause bars federal district courts from adjudicating suits brought by private litigants against states or their agencies. *Garcia v. City of Chicago*, 24 F.3d 966, 969 (7th Cir. 1994) (Garcia); see also *Fayemi v. Pucinski*, 155 F. Supp.2d 944, 948 (N.D. Ill. 2001) ("the Eleventh Amendment bars federal courts from exercising jurisdiction over actions brought by a citizen against a state, a state agency, or state official").

Here, Plaintiff's suit appears to be brought under 42 U.S.C. § 1983. Generally, under 42 U.S.C. § 1983, a plaintiff may be granted relief where he has been deprived rights or privileges secured for him by the Constitution and law. The application of the statute is limited in scope in terms of who may be sued by a plaintiff and under what circumstances they may be sued. Thus, if Plaintiff's suit is brought under Section 1983, the Court lacks jurisdiction because the State of Illinois has not consented to be sued; and Plaintiff's Section 1983 claims present no

Congressional override of the general prohibition against suit against states. The Plaintiff, however, in his Response, denies that his suit was brought under Section 1983 and assets that he is suing directly under Amendments to the Constitution and pursuant to the general grant of jurisdiction to federal courts over federal questions, 28 U.S.C. § 1331. Plaintiff also asserts that the Defendant waived its immunity when, in the child custody proceeding before the Cook County Circuit Court, the Cook County judge "wanted to hear and did hear from an employee of School District 54" and "used that evaluation in the administration of the law of the State of Illinois" and ordered the child to be enrolled in a public school. Plaintiff asserts that such actions amount to a waiver of Eleventh Amendment immunity because the public school system is, in part, federally funded.

The Plaintiff's arguments do not change the underlying issue: the Court lacks jurisdiction over the Plaintiff's suit against the State of Illinois. Plaintiff's constitutional claims before this Court appear to be presented through 1983, which, for reasons stated above, do not warrant a waiver of sovereign immunity. Further, the Court's jurisdiction over federal questions, under Section 1331, does not abrogate the Eleventh Amendment. The Court in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 86 (1996), stated, "the underlying jurisdictional statute involved in this case, 28 U.S.C. § 1331, does not itself purport to direct federal courts to ignore a State's sovereign immunity." Thus, Plaintiff has not cited to any applicable federal

statute that abrogates sovereign immunity in this case. Further, there has not been a valid waiver of Eleventh Amendment immunity. *Pennhurst* and its progeny require that the state's consent to suit must be "unequivocally expressed." 465 U.S. at 99. Here, the Defendant, the State of Illinois, has not expressed its consent unequivocally.

For the foregoing reasons, Defendant's Motion to Dismiss for Lack of Jurisdiction [8, 9] is granted. Plaintiff is given leave to file an amended complaint, if the Plaintiff can do so consistent with Federal Rule of Civil Procedure 11, stating proper grounds for federal jurisdiction, within twenty-one (21) days of this order. Failure to do so will result in dismissal with prejudice.